
AGREEMENT WITH HONG KONG ON THE TRANSFER OF SENTENCED PERSONS

OCTOBER 14 (legislation day, OCTOBER 2), 1998.—Ordered to be printed

Mr. HELMS, from the Committee on Foreign Relations, submitted
the following

REPORT

[To accompany Treaty Doc. 105-7.]

The Committee on Foreign Relations, to which was referred the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons, signed at Hong Kong on April 15, 1997, having considered the same, reports favorably thereon, with one declaration and one proviso, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

The basic goal of U.S. bilateral prisoner transfer treaties is the facilitation of the exchange of administrative responsibility for a final penal sentence and the enabling of prisoners to serve their sentences in their home country, where family and friends may more easily visit them.

II. BACKGROUND

On April 15, 1997, the United States and Hong Kong signed the Agreement for the Transfer of Sentenced Persons. That agreement

will replace the previous prisoner transfer relationship with Hong Kong, which was governed by the United States-United Kingdom extradition treaty. (An extradition agreement was approved by the Senate and entered into force in 1997, and a mutual legal assistance agreement with Hong Kong is expected to be considered simultaneously with this Agreement).

Because of Hong Kong's unique status, the Agreement was signed by Hong Kong with the "authorization" of its sovereign nation (People's Republic of China (PRC)) following a negotiation conducted under the auspices of the "Joint Liaison Group" (JLG) established by the Sino-British Joint Declaration on the Question of Hong Kong.¹ The People's Republic of China approved the text of the Agreement, permitting the United States and Hong Kong to sign in April.

As recent Agreements between the United States and Hong Kong are unprecedented U.S. treaty relationships, it is important to note the negotiation history that led to the Agreements between the United States and Hong Kong. Under the JLG process, four members each from the United Kingdom and the PRC (with support staff and experts as needed) review international agreements with regard to continuing obligations under them. In the case of new agreements, including this extradition agreement, the negotiation partners played the following roles: (1) the JLG agreed to a model agreement; (2) the U.K. Government, on behalf of the Hong Kong Government, asked the PRC to approve a list of negotiating partners (including the United States); (3) after approval of a negotiating partner, the British Foreign Secretary executed a formal entrustment to empower the Hong Kong Government to conduct negotiations on its behalf with the approved partner (in this case the United States) on the basis of the model agreement; (4) after the Hong Kong Government and the approved partner initialed the text of the agreement, the text was passed by the British Government to the PRC Government through the JLG for its approval (the PRC Government was permitted to seek clarification if the initialed text departed significantly from the model agreement and further negotiations would then be required); and (5) the PRC approved the text of the agreement, permitting its signature by the Government of Hong Kong and the negotiating partner (the United States in this case).

III. SUMMARY

A. GENERAL

The domestic implementation of prisoner transfer agreements is covered generally by the provisions of 18 U.S.C. §§ 4100 et seq. A majority of U.S. states also have provisions for the transfer of pris-

¹ Under the Joint Declaration, sovereignty over Hong Kong was transferred to the PRC on July 1, 1997. Hong Kong is organized as a Special Administrative Region (HKSAR) with a "high degree of autonomy" except in foreign and defense affairs. Among the incidents to this autonomy is the ability of the HKSAR to maintain its own executive, legislative, and independent judicial systems for a least 50 years under a "one country, two systems" policy. Though the PRC assumed ultimate power over Hong Kong's foreign affairs, the Joint Declaration nonetheless envisions the HKSAR maintaining its own external relations in many fields through a network of international agreements. However, the permissible reach of this network and the role of the PRC are not always clear.

oners incarcerated in state facilities. Among other things, the federal statutes provide for the procedure for transfer, particularly the verification of the consent of the prisoner to be transferred.

B. KEY PROVISIONS

1. Conditions for Transfer

Basic conditions for transfer must exist. In order for a transfer to go forward, dual criminality must exist; the sentenced person must be a citizen or national of the United States, when the United States is the receiving party; a minimum of one year must remain to be served in the sentence at the time the request for transfer is received; the judgment must be final with no pending proceedings; both Parties and the sentenced person must agree to the transfer; and in the case of a conviction by a U.S. state, that state must consent to the transfer.

These requirements are common to all prisoner transfer treaties to which the United States is a party. As noted above, however, the basic conditions for transfer differ from other agreements with respect to the requirement that where Hong Kong is the receiving party, the sentenced person must be a permanent resident of Hong Kong, but not necessarily a national of the PRC.

2. Procedures for Transfer

The treaty obligates Parties to inform prisoners of their right to request a transfer. A sentenced person may initiate a transfer request by communicating a wish to transfer to either party, which shall than inform the other party in writing of the request.

The Party receiving the request shall inform the other Party promptly of its decision to consent to the transfer. The written requests for transfer shall include information identifying the sentenced person, giving the location of the person and indicating the nationality, citizenship or residence status of the person.

The transferring party shall inform the receiving Party, to the extent practicable, about the factual and legal information concerning the offense for which the sentence was imposed, the certificate or record of conviction, the duration of the sentence, the time served, and any reduction of sentence to which the sentenced person may be entitled due to good behavior, pre-trial incarceration, etc.

Additionally, either Party shall provide the other Party, upon request, with any additional relevant information before making a request for transfer or deciding whether to consent to transfer.

The exchange of the prisoner shall take place at a date and place within the jurisdiction of the transferring party agreed upon by both Parties. The Parties shall keep the sentenced person informed in writing of any action taken to effect the transfer.

3. Enforcement of Sentences

The transferring party retains the exclusive jurisdiction for the review of convictions and sentences of its courts. This is typical of such agreements. Although the laws of the receiving party govern the administration of a sentence, the transferring party still retains

the sole right of actual review and of reversing a conviction or pardoning the offender.

Prisoner transfer treaties require that the laws and procedures of the receiving Party regulate the continued enforcement of the sentence with respect to the conditions for imprisonment and any reduction of sentence, conditional release, or parole.

However, although the receiving Party is obligated to enforce the sentence as if it had been imposed in the receiving party, if the sentence is incompatible by its duration or nature with the laws of the receiving Party, that Party may adapt the actual sentence in accordance with the sentence prescribed under its own laws for a similar offense.

4. Third Party Transit

The Treaty requires that where either party is transferring a sentenced person from another country or jurisdiction, the other party shall cooperate in the transit of the sentenced person through its territory. Advance notice is required in the case of a third country transfer.

IV. ENTRY INTO FORCE AND TERMINATION

A. ENTRY INTO FORCE

The Agreement enters into force thirty days after the date on which the Parties have exchanged instruments of ratification.

B. TERMINATION

Either Party may withdraw from the Treaty by means of written notice to the other Party. Termination would take place three months after the date of receipt of notification.

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed Agreement on September 15, 1998. The Committee considered the proposed Agreement on October 14, 1998, and ordered the proposed Convention favorably reported, with the recommendation that the Senate give its advice and consent to the ratification of each of the proposed Treaties subject to one declaration, and one proviso.

VI. COMMITTEE COMMENTS

The Committee on Foreign Relations recommends favorably the proposed Agreement. On balance, the Committee believes that the proposed Agreement is in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. Several issues did arise in the course of the Committee's consideration of the Treaties, and the Committee believes that the following comments may be useful to the Senate in its consideration of the proposed Agreement and to the State Department.

During the consideration of the proposed Agreement, a question was raised as to the applicability of the implementing statute. It appears that the federal statute must be amended or clarified to fully implement the treaty.

The U.S.-Hong Kong prisoner transfer agreement parallels other bilateral prisoner transfer agreements to which the United States is a party. Therefore, with perhaps one exception, the federal statutes providing for the implementation of prisoner transfer agreements need not be amended. Under 18 U.S.C. § 4100(b), an offender may be transferred from the United States only to a country of which the offender is a citizen or a national. Under the Council of Europe Convention which previously governed prisoner transfers between Hong Kong and the United States, parties could define “national” broadly. The UK defined “national” with respect to dependent territories as “a person who is a British Citizen or a British Dependent Territories Citizen by virtue of a connection with that Territory, or any other person whose transfer to the Territory appears to the officer for the time being administering the Government of that Territory to be appropriate having regard to any close ties which that person has with that Territory.”

Article 4 of the proposed bilateral Agreement between Hong Kong and the United States provides that a sentenced person may only be transferred to Hong Kong where the sentenced person is a “permanent resident” of Hong Kong. Article 1 defines “permanent resident” as “a permanent resident of Hong Kong.” As mentioned above, the group defined as “permanent residents of Hong Kong” may include persons who are not nationals of the PRC. Since the bilateral agreement with Hong Kong does not include or permit by its terms a broad definition of “national” similar to that declared by the United Kingdom under the Council of Europe Convention, the terms of the agreement do not track those of the U.S. federal statutes governing prisoner transfer.

Therefore, the Committee believes that the federal statute should be amended or clarified to explicitly apply to and perhaps to define “permanent residents of Hong Kong,” unless the United States only intends to apply the agreement to those permanent residents of Hong Kong who are nationals of the PRC. The Committee expects that the United States will be able to transfer prisoners only to the extent permitted by current U.S. law.

VII. EXPLANATIONS OF PROPOSED TREATIES

For a detailed analysis of the Agreement, see pages V–VII of the Letter of Submittal by the Secretary of State in Treaty Doc. 105-7.

VIII. RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Agreement between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons, signed at Hong Kong on April 15, 1997 (Treaty Doc. 105-7), subject to the declaration of subsection (a), and the proviso of subsection (b).

(a) DECLARATION.—The Senate’s advice and consent is subject to the following declaration, which shall be binding on the President:

TREATY INTERPRETATION.--The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(b) PROVISIO.—The resolution of ratification is subject to the following proviso, which shall not be included in the instrument of ratification to be signed by the President:

SUPREMACY OF THE CONSTITUTION.—Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.